BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Application Of Wisconsin Energy Corporation For Approval Of A Transaction By Which Wisconsin Energy Corporation Would Acquire All Of The Outstanding Common Stock Of Integrys Energy Group, Inc.

Docket No. 9400-YO-100

REPLY BRIEF OF WISCONSIN INDUSTRIAL ENERGY GROUP AND WISCONSIN PAPER COUNCIL

The Commission should deny the Transaction and close this proceeding. Perhaps in its Final Decision it could suggest an element or two that Wisconsin Energy Corporation ("WEC") might wish to include in its next application for approval that would bring its proposal nearer the "best interests" standard required of Wis. Stat. § 196.795(3). It might wish to make clear that it regulates public utilities, not the reverse. It could explain that WEC is the applicant; that WEC is asking the Commission for its approval; and that if WEC wants that approval, then WEC needs to prove why the Transaction is in the best interests of not just WEC's investors (which no one doubts), but also its millions of captive utility consumers and the public (which no one but WEC witnesses believe). And it should instruct WEC that its apparent view of the "best interest" standard is wrong: the Commission is not obligated to approve the Transaction if utility consumers and the public fail to prove that the Transaction will harm them. However, whether the Commission wishes to provide WEC a roadmap to a successful subsequent application or not, it must not approve the Transaction with only those few conditions WEC has accepted to date.

The Commission should have no doubts that the Transaction arises out of WEC's interest in maximizing shareholder value. After all, WEC's Board of Directors has a fiduciary duty to its shareholders. Wis. Stat. § 180.0827. It is a duty that WEC does not have to its customers. Sure, in considering its shareholders' best interests it may consider the best interests of its customers. *Id.* Indeed, for most businesses—in areas where competition is abundant—one would expect a board of directors to give consideration to its customers' interests or risk losing those customers to competitors. The tension such a free-market business faces is maximizing shareholder profit while maintaining the customers who will continue to contribute to shareholder profit. Thus, in a competitive market, the customers' freedom to chose among more than a single supplier is the natural governor to excess and abuse. If a board of directors moves too aggressively to maximize shareholder profit at the expense of its customers, it risks losing the very customers it needs to increase shareholder profit.

Regulated utilities in Wisconsin, with captive customers, do not have this natural governor. They can maximize shareholder profit at the expense of customers without any concern that those customers will find a less expensive alternative. There are no less expensive alternatives. Thus, a utility like Wisconsin Electric Power Company ("WEPCO") can consistently, year after year, return fantastic profits to its shareholders while also charging its captive customers the highest electric rates among Wisconsin's investor-owned utilities (excepting Madison Gas & Electric Company) and among the very highest in all the Midwest. Its customers cannot check the utility's behavior. Their only alternate to the utility is to leave the state. This Commission, though, can check the behavior of those utilities it regulates. Indeed, the Commission's charge is to protect utility consumers. *See*, *e.g., GTE North, Inc. v. PSC*, 176 Wis. 2d 559, 568, 500 N.W.2d 284 (Wis. 1993).

When WEC filed the case nine months ago, Wisconsin Industrial Energy Group and Wisconsin Paper Council (together the "Industrial Customers") reserved judgment. But members who were customers of WEPCO worried that the Transaction would add pressure to WEPCO's already high rates; members who were customers of WPSC worried that the Transaction would lead to the levelization of rates between WEPCO and WPSC which, in their view, almost certainly would mean increased rates for WPSC. The Industrial Customers cautioned members to withhold judgment until WEC provided more information and greater detail about the Transaction; until our consultants could better understand how the Transaction would affect utility consumers. Turns out that the additional time was unnecessary, though, because WEC produced no more details of how utility consumers would benefit from the Transaction after it filed its case. The so-called benefits are as uncertain and illusory today as they were when WEC first announced the Transaction.

Somewhere along the way—perhaps because its focus was on securing approvals in Illinois and Michigan—WEC appears to have forgotten that it is the Applicant in this proceeding; that it is seeking the Commission's approval for its desired $9.1 billion acquisition of Integrys Energy Group ("Integrys"); that it is required to show that the transaction is in the best interests of utility consumers and the public. Because in its Initial Brief, WEC relieves itself of the obligation to prove that the Transaction is in the best interests of utility consumers and the public and instead places squarely on Intervenors the obligation to prove the reverse: that the Transaction is not in the best interests of utility consumers and the public.

Take for instance the "best interests" standard WEC must meet. WEC's main witness Mr. Reed testified that he believed that WEC could meet the statutory standard by considering

the utility consumers, shareholders, and the public in the aggregate. Really? Does WEC actually believe that it can meet the standard by showing nothing more than that shareholder benefits exceeded the combined harm to utility consumers and the public? It is hard to believe that it could, particularly where WEC has been through an acquisition not too long ago when seeking the Commission's approval to acquire WICOR. In this earlier case, WEC faced the same statutory requirement. In the Application of WEC for Approval to Acquire the Stock of WICOR, Inc., dockets 9401-YO-100 & 9402-YO-101 (Wis. PSC Mar. 15, 2000), the Commission did not aggregate the three groups but instead considered benefits to each separately. *Id.*, at 8.

WEC also suggests that it does not have to show that the Transaction will bring about utility consumer benefits. This assertion is also undermined by the WICOR acquisition, where WEC need to show customer benefits, not just that they would not be harmed. *Id.* Nonetheless, WEC in this case tries to place the burden to prove that the Transaction is not in utility consumers best interests on the Intervenors. And then asserts that Intevernors have "not submitted any actual evidence demonstrating that [what WEC argues are benefits] do not exist or that these conditions do not suffice to ensure that the Transaction **will** be in the best interests of utility consumers, investors, and the public. Nor have they identified any harm that the Transaction **will** cause these stakeholders." WEC Initial Brief, at 9-10.

The Commission must reject WEC's interpretation of the "best interests" standard. It should instead recognize that the "best interest" analysis for each individual group requires the following consideration for utility consumers: are they better off without the Transaction or with the Transaction. And as the Industrial Customers, Citizens Utility Board ("CUB"), Great Lakes Utilities ("GLU") and other Intervenors have shown, the Transaction is not in utility consumers'

best interests, even with the conditions that WEC has accepted. Most significantly, WEC either is sufficiently uncertain that Wisconsin ratepayers will benefit or sufficiently certain they will be harmed from the Transaction that it refuses to guarantee any benefits whatsoever.

Unfortunately, in response to the reasonable requests that Intervenors have made that ratepayers must be given some real financial benefit, WEC appears to threaten the Commission with lawsuits if it were to adopt those proposed conditions. If a portion of the transmission escrow is written off, WEC threatens a charge of "retroactive ratemaking". WEC Brief, at 12. If the Commission should condition approval on WEC giving consumers a bill credit, WEC threatens that such a credit is a tax. WEC Brief, at 12. And if the Commission were to order an earnings cap, WEC suggests it will sue on grounds of retroactive ratemaking. WEC Brief at 14. Should the Commission decide to approve the Transaction, Industrial Customers strongly urge the Commission to approve these proposals. However, the Intervenors' proposals were intended to serve as avenues to ensure that the Transaction was in the best interests of utility consumers, not to punish WEC. But in its present form, the Transaction is not in consumers' best interests, and in fact, will cause harm.

It is somewhat ironic that WEC distinguishes this case from those involving other Wisconsin utility cases by acknowledging that Wisconsin Power and Light Company and Northern States Power Company, when agreeing to an earnings cap, did so voluntarily and through negotiations. WEC certainly is correct on the facts. But it is worth asking *why* WEC has not formally negotiated with the Commission in Wisconsin, nor Wisconsin customer groups. WEC has negotiated with Michigan and Illinois regulatory agencies and those states' respective customer groups. Why not here? And why WEC's demand that Wisconsin reach its decision before other states while at the same time troubled by a "most favored nations" condition?

A. NONE OF THE BENEFITS WEC STATES THAT IT IS PROVIDING CUSTOMERS AND ITEMIZES ON PAGE 6 AND 7 OF ITS BRIEF ARE CERTAIN; MANY ARE NOT EVEN BENEFITS.

WEC is not shy about its use of absolutes when describing the Transaction in general terms. For instance, it states that the Commission need not decide whether the standard under Wis. Stat. § 196.795(3) means that WEC must show "no harm" or "net benefits" because the Transaction "will provide benefits for utility consumers, investors, and the public." WEC Initial Brief, at 6 (emphasis in the original). It immediately follows this assertion with the heading of its section B wherein it writes that WEC has agreed to "conditions that will ensure the Transaction delivers value." *Id.* (emphasis supplied). These unqualified assertions simply are not true. WEC has expressly refused to ensure that the Transaction delivers value. While it ought not be necessary to turn to a dictionary for the definition of a term as common and uncomplicated as "ensure", we should make certain that WEC, the Intervenors, and this Commission share a common understanding of the word. "Ensure" means "to make sure or certain; insure." American Heritage Dictionary. WEC refuses to do so, though.

WEC President, Allen Leverett, together with WEC CEO Gale Klappa, sets "overall direction and strategy for the company." (Rebuttal-WEC-Leverett-1). He testified to "WEC's positions on . . . merger conditions proposed by Staff and Intervenors" including those that Intervenors support as reasonable guarantees of customer benefits. Asked whether WEC would stand behind its weakly supported assertions of ratepayer benefits, he declined to ensure that ratepayers would benefit with an unequivocal "no".

> Q: [y]ou state that net savings of the transaction estimated by Mr. Reed to be 3 to 5 percent of non-fuel O&M over time will be passed on to ratepayers, thus ratepayers, quote, will benefit from the transaction, and the will is in emphasis. So is WEC guaranteeing benefits to customers from the transaction?
>
> A: **No.**

Q: At no dollar amount?
A: **No.**
Q: But you state that there will be benefits?
A: Yeah, expect there will be.
Q: But you're not willing – the company is not willing to guarantee any of them?
A: **No.**

(Transcript Vol. 4, at 18). WEC witness Mr. Reed—the utility's key expert on benefits that will arise from the Transaction—also stopped short of ensuring ratepayer benefits. He offered that in 5 to 10 years ratepayers could see savings of between 3 and 5 percent. But this was not by any means a certainty. Even Mr. Reed, WEC's main witness, is not sure that the Transaction will "be in the best interest of the utility consumers, and the investors, and the public." Sure, he thinks it highly likely. But of course he must acknowledge that "[t]here is no guarantee. . . ." (Transcript Vol. 4, page 122).

If the Transaction is approved without WEC guaranteeing any consumer benefits, five years from now, with no showing of 3 to 5 percent savings, WEC will be able to say (correctly) that it never promised that there would be savings within five years. And five years after that, when the savings still have not materialized, WEC will be able to say (again correctly) that while it did believe that the savings would be found within ten years, it was mistaken in that belief. Unfortunately, such an acknowledgement will be little help to utility consumers if WEC does not now guarantee those savings it anticipates will be found.

So, in short, all of the absolutes which WEC uses in its list of ratepayer benefits on page 7 are anything but absolute. WEC is not certain of any of them because there are no guarantees. Or at least WEC is sufficiently uncertain of the benefits that it will guarantee none of them. Further, several of the bullets are not even benefits because they exist with or without the Transaction. WEC cannot claim as a benefit of the Transaction its continuation of activities it has engaged in for years. We do not wish to diminish the good work that WEC does for the

community. But WEC is disingenuous to label as a ratepayer or public benefit arising out of this Transaction what it has been doing for years: contributing to the economic good of the community; honoring employment contracts; keeping its headquarters in Wisconsin. The proposed Transaction is not providing the state any benefit that does not already exist. And it offers no guarantees that it will not reconsider some years in the future.

B. YES, THE INTERVENORS INSIST THAT THE COMMISSION CONDITION AN APPROVAL ON THE UTILITY CONSUMERS RECEIVING CERTAIN BENEFITS. HOWEVER, THEY DO NOT INSIST THAT THEY RECEIVE THOSE CERTAIN BENEFITS ON "DAY ONE"

The Commission should not be misled by WEC's description of what Intervenors are proposing. Intervenors simply are not demanding that ratepayers receive benefits on "day one." Certainly Industrial Customers have not so much as suggested that consumer benefits must flow to them on the day that the Transaction is consummated. At the same time, though, Industrial Customers do believe that WEC must provide certain benefits much earlier than "five to ten years" from now.

WEC challenges Intervenors' arguments by stating, incorrectly, that the Intervenors argue that monetary benefits are due on the first day. Initial Brief, at 4. It then strikes at that argument by focusing on the "day one" requirement (which Industrial Customers have not proposed) and not on the "certainty" (which Industrial Customers have proposed). Further, WEC challenges Intervenors' proposals as contrary to the rule against retroactive ratemaking and as confiscations of property. WEC's positions on these proposals are undermined by its very own proposals in past cases. For example, in Docket No. 05-UR-102, WEPCO itself proposed an earnings cap mechanism that involved writing off deferred account balances. *See* Final Decision, WEPCO

Rate Case for Test Year 2006, Docket 5-UR-102 (Jan. 26, 2006) at 21-22 (PSC REF#: 48654). A position that is quite contrary to the one WEC now makes.

The "positive benefit" conditions supported by Commission Staff and Intervenors have in common two elements: 1) greater certainty that compared to the base case, the Transaction will result in benefits to utility consumers, and 2) benefits that are not necessarily received on the first day.

Transmission Escrow – The Commission will ensure that utility consumers receive a certain benefit with the Transaction by conditioning its approval on the write-off of some or all of WEPCO's transmission escrow costs. (Direct-WIEG-Kollen-22 (Item 92); Direct-CUB-Hahn-27 (Item 90); Direct-Jobs4WI-Vock-17 (Item 89); Direct-PSC-Kettle-5-7, Kirect-PSC-Larson-5, Rebuttal-PSC-Kettle-2-4 (Item 91). While a certain benefit, it is not immediate. The Transmission escrow costs currently are not in rates of course; without the condition one would expect WEPCO to seek recovery of all of these costs in one or more future rate proceedings. A write-off will keep WEPCO from recovering some or all of these costs in that future rate proceeding. The benefit is one then that necessarily will not be "received" immediately.

WEC challenges the Commission's authority to require WEPCO to write-off certain of its transmission escrow. That challenge is misplaced. The Commission has not yet authorized WEPCO to recover in rates certain deferred transmission costs. (Direct-PSC-Kettle-2-3) And the deferral of costs does not assure that the Commission will subsequently allow those costs to be recovered in rates. *See* Final Decision, Application of WPSC for Authority to Adjust Rates, Docket 6690-UR-117 (December 22, 2005), at 21 (PSC REF# 46790). Moreover, as noted immediately above, WEPCO has itself supported writing off deferred costs in similar

circumstances as those we face here. Final Decision, WEPCO Rate Case for Test Year 2006, Docket 5-UR-102, at 21-22 (PSC REF#: 48654).

Bill Credit – The Commission will ensure that the utility consumers receive a certain benefit with the Transaction by condition its approval on a rate-payer bill credit. (Direct-PSC-Larson-3-4; Direct-PSC-Larson-24-29 (Item 78)). Of the three "benefit proposals" with greatest support among Intervenors, this one comes closest to providing "day one" savings. However, the mechanism by which the credit would be given to ratepayers could take many forms and need not be given to customers by any date certain. The timing of the credit is not the place of disagreement between WEC and Intervenors; only whether the credit be given ratepayers is. The use of a credit in this fashion has seen support from WEPCO in the past as well. Final Decision, WEPCO Rate Case for Test Year 2006, Docket 5-UR-102, at 21-22 (PSC REF#: 48654).

Proposed Earnings Cap – Necessarily, should the Commission condition approval on a proposed earnings cap, utility consumers will not be guaranteed savings. Utility consumers would receive a benefit from the Transaction only if the Transaction resulted in savings to the regulated utilities. And where that did happen, savings would not be passed on to utility consumers until after the year in which the utility did earn more than its authorized return and then only in a subsequent rate proceeding.

Further, WEC's assertion that earnings caps would amount to retroactive ratemaking is also misplaced. Industrial Customers have proposed an earnings cap on a prospective basis only. In so doing those savings WEC would realize as a consequence of synergies arising from the Transaction would be shared with ratepayers to the extent—and to that extent only—those savings allowed the regulated utilities to earn more than the authorized return. (Direct-WIEG-Kollen-22).

Moreover, WEC itself proposed an earnings cap several years ago. *See* Final Decision Docket 5-UR-102 at 21-22. Under its own proposal, if WEPCO's earnings exceeded an "earnings band," the Commission could "direct WEPCO to write off deferred account balances, provide a refund to its customers, or both." *Id.*

The upshot is this. Yes, Industrial Custumers believe that utility consumers must have certainty that the Transaction is in their best interests, and that best interests require that they receive some certain benefit. However, while they believe that receiving benefits 5 to 10 years from now is much too long a time to wait for possible benefits, they do not believe that the benefit has to arrive on "day one." They also do not believe that the benefits that they have proposed in this proceeding run afoul of the rule against retroactive ratemaking.

C. WEC'S ARGUMENT THAT MORE PROTECTIONS ARE NOT NECESSARY FOR RATEPAYERS IS PREMISED ON THE MISPLACED BELIEF THAT INTERVENORS HAVE TO PROVE THAT THE HARMS ARE CERTAIN TO MATERIALIZE.

Further irony is found in WEC's brief with the premise for its resistance to greater ratepayer protections. Remarkably, although WEC needs the Commission's approval for the Transaction, it argues on the one hand that it does not have to guarantee any customer benefits, at all, because WEC does not need to prove that ratepayers will receive benefits; it believes it sufficient to show that benefits are likely (which Industrial Customers nevertheless dispute). And on the other hand, WEC argues that it does not have to provide greater ratepayer protections; it believes that ratepayers must prove that they will be harmed. The Commission must reject this WEC's interpretation of the standard for approval. As noted in Industrial Customers' Initial Brief and above, WEC has the burden to bring forward evidence that the Transaction is in utility consumers' best interests. It is not the utility consumers' burden to bring

forward evidence that the Transaction is not in their best interest, much less prove that the risks that WEC asserts are not likely to occur are certain to occur.

D. INDUSTRIAL CUSTOMERS SUPPORT CUB'S PROPOSED CONDITION REQUIRING WEPCO AND WPSC TO COOPERATE ON GENERATION RESOURCES AND GLU'S PROPOSED CONDITION REGARDING WEC'S INFLUENCE ON THE AMERICAN TRANSMISSION COMPANY.

In addition to the conditions that Industrial Customers have proposed be incorporated into any approval of the Transaction, they also support conditions proposed by Citizens Utility Board and Great Lakes Utilities.

At page 29 of its Initial Brief, CUB proposed that WEPCO and WPSC be required to work together on their respective generation status. WEPCO is long on generation while WPSC has recently filed an application for approval of a new 400 MW facility at its Fox Energy site. Specifically, CUB proposes that "the Commission [] require WEPCO and WPSC to evaluate a power purchase agreement for the sale of capacity from WEPCO to WPSC for at least ten years (2019-2028) that would delay any claimed need for Fox 3." CUB Initial Brief, p. 29-30. Industrial Customers agree with CUB that this condition provides WEPCO and WPSC an opportunity to meet the others' needs for the benefit of their respective customers.

GLU focuses primarily on WEC's influence on American Transmission Company once it holds a majority ownership interest in the utility. Industrial Customers share the concerns and agree with GLU that the additional protections it proposes would minimize the risk that ATC will be subject to undue influence by WEC. GLU Brief, at 11-14. Reducing that risk will not only protect GLU and its customers, but electric customers of all Wisconsin utilities that are served with ATC Transmission.

CONCLUSION

The Industrial Customers respectfully request that the Commission take those actions identified in its Initial Brief and as supported here.

Respectfully submitted this 6th day of April 2015.

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